

MILICENT ROSALIND DANKER & ANOR**A****v.****MALAYSIA-EUROPE FORUM BHD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR

B

HARMINDAR SINGH DHALIWAL JC

[CIVIL SUIT NO: S-22NCVC-109-2010]

18 MAY 2011

CONTRACT: Breach - Agreement - Civil Society to promote Malaysia in Europe - Whether there was an agreement to appoint first plaintiff as head of Brussels Secretariat - Whether there was a concluded contract - Decision of members to cancel setting up of Brussels Secretariat - Whether a breach of contract - Compensation - Assessment of

C

CONTRACT: Breach - Agreement - Civil Society to promote Malaysia in Europe - Memorandum of Understanding between defendant and second plaintiff to hold a summit - Whether cancellation of summit due to insufficient funding - Whether agreement became frustrated for fear of making losses - Whether second plaintiff entitled to claim

D

CONTRACT: Breach - Fiduciary duties - Whether first plaintiff breached obligations as trustee - Whether first defendant's counterclaim could not succeed

E

TORT: Conspiracy - Conspiracy to injure - Breach of agreement - Whether there were sinister motives in decisions and actions taken by defendants - Whether there was a predominant purpose of injuring plaintiffs - Whether claim clearly unsustainable

F

TORT: Damages - Loss of reputation - Whether recoverable in action founded on breach of contract - Contracts Act 1950, s. 74

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The first defendant was a company limited by guarantee set up as a civil society organisation to promote Malaysia in Europe by utilising the strengths of Malaysians abroad and building professional networks between Kuala Lumpur, London and Brussels. The first plaintiff was the founder, first chairperson and trustee as well as member of the first defendant from the time of its incorporation in 2006. The plaintiff was also at all material times the Chief Executive Officer, a director and shareholder of a company, Perception Management Sdn Bhd ('PMSB') and its related companies including the second plaintiff. The first plaintiff had formed the Board of Trustees ('BOT') that managed the first

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- A defendant, and PMSB's premises was agreed to be the first defendant's Malaysian Secretariat. The practice between PMSB and the first defendant was that PMSB's staff and resources were used to administer and manage the affairs of the first defendant. On 12 November 2009, the first defendant was officially launched
- B and the government pledged a sum of RM2 million. A first *tranche* of RM1 million was released to the first defendant by the government and this receipt appeared to energize the parties into implementing the Brussels Secretariat as well as taking steps to implement the Global Emerging Markets Summit 2010 ('GEMS 2010').
- C In April 2010, an agreement was signed between the second plaintiff, and the first and fourth defendants to plan and implement GEMS 2010. However, after several meetings, an extraordinary general meeting ('EGM') was called on 18 August 2010 and it was resolved to cancel the Brussels Secretariat. At
- D about the same time, the first defendant also terminated the service agreement between the first defendant and PMSB. The first defendant's Malaysian Secretariat was then moved into the fourth defendant's office premises under a new service agreement. Meanwhile, six weeks before the scheduled date, GEMS 2010 was
- E also cancelled. Herein, the first plaintiff's claim against the first defendant was for breach of contract of her employment. The plaintiffs also brought a claim for conspiracy to injure against the remaining defendants. The issues that arose for consideration were
- F (i) whether there was an agreement between the first plaintiff and the first defendant to appoint the first plaintiff as the head of the Brussels Secretariat and whether there was a breach of this agreement; (ii) whether the first plaintiff should be compensated; (iii) whether there was conspiracy to injure and to induce breach of contract; (iv) whether the second plaintiff was entitled to claim
- G against the first and fourth defendants; (v) whether the plaintiffs were entitled to claim for loss of reputation, mental stress, torment and harassment; (vi) whether the first defendant was entitled to counterclaim against the first plaintiff for breach of fiduciary duties.
- H **Held (allowing first plaintiff's claim in part; dismissing second plaintiff's claim against first and fourth defendants; dismissing first defendant's counterclaim against first plaintiff; disallowing all other claims by plaintiffs):**
- I (1) The setting up of the Brussels Secretariat was one of the reasons advanced to obtain funding from the Government of Malaysia. A Circular Resolution dated 1 April 2010 affirmed

that BOT had authorised the setting up of the Brussels Secretariat. In the BOT meeting of 12 April 2010, it was decided that the first plaintiff would be appointed to spearhead the operations and setting up of the Brussels Secretariat. The first defendant had appointed and the first plaintiff had accepted. There was no condition precedent to there being a formal written agreement before there being a concluded contract (*Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah; Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd*). Thus, there was a concluded agreement between the first plaintiff and the first defendant. With the decision of the members voting against the setting up of the Brussels Secretariat at the EGM on 18 August 2010, the agreement between the first plaintiff and the first defendant had come to an end. There was therefore a breach of the contract. (paras 18, 20, 22 & 23)

- (2) The plaintiff had claimed for, amongst others, the sum of RM288,000 (EU36,000 per year X 2) which was the agreed payment for her two year appointment to head the Brussels Secretariat and the sum of RM327,600 being the first plaintiff's time costs in handling matters for the Brussels Secretariat and GEMS 2010. By any measure, the claims made by the plaintiff's time costs were rather outlandish claims. The plaintiff could not claim both the loss of salary in Brussels as well as the loss of salary and other income in Malaysia. Furthermore, the time costs she was claiming were never agreed and had never ever been claimed prior to this. Thus, the plaintiff's only entitlement to damages would be the loss of salary from August 2010 to December 2010 at RM22,140 per month due to her resignation to take up the Brussels appointment. She had resumed her employment after that period as confirmed by PW5, the director and Group Financial Advisor of PMSB. Any other amount apart from this would amount to a windfall and would be unjust and inequitable. Therefore, the damages to the plaintiff was assessed at RM110,700 and the sum of RM9,150, being expenses reasonably incurred in attending to the handing over of the Brussels premises, was allowed. (paras 27, 28 & 29)
- (3) The defendants had provided valid reasons in overturning the decision to set up the Brussels Secretariat. The main issue was funding. The BOT was correct in being concerned about money and the issue of being accountable for the RM1 million

- A received from the Government of Malaysia. There was no sinister motive as insinuated by the first plaintiff. Also, the decision not to continue with GEMS 2010 was based on financial and other reasons. The non-attendance of the Prime Minister of Malaysia as well as the Patron would reduce the impact and significance of the Summit. As for terminating the agreement with PMSB, the first plaintiff had already indicated that she wanted the first defendant to move out from PMSB's office after December 2010. Further, all decisions were made transparently at meetings. There was no evidence of the motives of the trustees or others in question of being spiteful and malicious. The actions taken were for the benefit of the first defendant and not with the predominant purpose of injuring the plaintiffs. The claim of conspiracy was clearly unsustainable. (paras 39 & 41)
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- D (4) A Memorandum of Understanding dated 13 April 2010 ("MOU") was entered into between the first defendant, the fourth defendant and the second plaintiff to jointly prepare and hold the GEMS 2010. This summit was eventually aborted and the second plaintiff was claiming that there was a breach of the agreement. However, all the parties had recognised that there was a real risk of incurring unnecessary losses because there was at that time insufficient funding. There was also a genuine concern that GEMS 2010 could not be successful. Thus, there was no breach. The whole agreement had become frustrated because of the fear of making losses. It was accepted by all the parties that GEMS 2010 had to be aborted. The second plaintiff's claim must fail. (paras 42, 44 & 46)
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- G (5) It is trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract. Any such claim would have to pass the remoteness rule in s. 74 of the Contracts Act 1950. It could not be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage was far too remote. Therefore, damages for loss of reputation generally could not be claimed except in actions for defamation. No damages were therefore allowed in this regard. (paras 50 & 51)
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- (6) The first defendant contended that the first plaintiff had breached her obligations as trustee and breached her fiduciary duties to the first defendant when she caused the payment of RM50,000 to be made by the first defendant to PMSB, a company in which the first plaintiff had an interest. However, there was no breach of any fiduciary duty simply because there was in existence a service contract for one year between PMSB and the first defendant at RM5,000 per month. Payment was required under the contract. Thus, the counterclaim could not succeed. (para 53)

Case(s) referred to:

- Addis Gramophone Co Ltd* [1909] AC 488 (*refd*)
British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd [1912] AC 673 (*refd*)
CCA Holdings Ltd v. Palm Resort Bhd [1998] 4 CLJ 440 HC (*refd*)
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA (*refd*)
Crofter Hand Woven Harris Tweed Company Limited & others v. Veitch & Anor [1942] AC 435 (*refd*)
Hadley v. Baxendale (1854) 9 Exch 341 (*refd*)
Kapt (B) Hj Mohamad Ismail v. Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 HC (*refd*)
Koufos v. Czarnikow Ltd [1969] 1 AC 350 (*refd*)
Lonrho Plc v. Fayed [1992] 1 AC 448 (*refd*)
Lonrho Plc & Others v Fayed & Others (No. 5) [1994] 1 All ER 188 (*refd*)
Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd [2002] 5 CLJ 391 HC (*refd*)
Robinson v. Harman (1848) 1 Exch 850 (*refd*)
Simonius Vischer & Co v. Holt & Thompson [1979] 2 NSWLR 322 (*refd*)
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC (*refd*)

Legislation referred to:

Contracts Act 1950, s. 74

For the plaintiffs - Renu Zechariah (SC Ho with him); M/s Rosley Zechariah
For the defendants - Sanjay Mohan (Rohan Arasoo & Mohd Raihan Abdul Khalip with him); M/s Kadir, Andri & Partners

Reported by Suhainah Wahiduddin

A JUDGMENT

Harmindar Singh Dhaliwal JC:

B [1] This whole dispute revolves around the Malaysia-Europe Forum Bhd, the 1st defendant. The 1st defendant is a company limited by guarantee set up as a civil society organization to promote Malaysia in Europe by utilizing the strengths of Malaysians abroad and building professional networks between Kuala Lumpur, London and Brussels. The 1st defendant is managed through a Board of Trustees (“BOT”) and a chairperson appointed from among the said trustees. The 1st plaintiff was the founder, first chairperson and trustee as well as member of the 1st defendant from the time of its incorporation in 2006.

D [2] The 1st plaintiff was at all material times also the Chief Executive Officer, a director and shareholder of a company known as Perception Management Sdn Bhd (“PMSB”) and its related companies including the 2nd plaintiff.

E [3] The 2nd plaintiff was appointed as the Executive Director of the 1st defendant at a monthly salary of RM5,000 excluding expenses on a flexible and part-time arrangement on 1 January 2009.

F [4] The 3rd defendant is a trustee of the 1st defendant and has an interest in the 4th defendant as its Chief Executive Officer. The 3rd defendant was also appointed as treasurer of the 1st defendant.

G [5] The 1st plaintiff’s claim against the 1st defendant is for breach of contract of her employment. The plaintiffs also have a claim for conspiracy to injure against the remaining defendants. There is also a counter claim by the 1st defendant against the 1st plaintiff for breach of fiduciary duties.

The Background Facts

H [6] The 1st defendant was conceived and set up by the 1st plaintiff with the plan to promote Malaysia in Europe and *vice versa*. The 1st plaintiff was responsible for its setting up, its administrative and financial management and the planning and execution of local and international activities. She was duly elected chairperson from among the trustees. She formed the BOT, institutionalized the secretariat and was instrumental in drafting the Constitution.

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[7] From 2006 onwards, the 1st plaintiff was entrusted to manage the 1st defendant on her own as the 1st defendant had only four to five trustees most of whom resided in Europe. PMSB's premises was agreed to be the 1st defendant's Malaysian secretariat. The practice from 2006 between PMSB and the 1st defendant was that PMSB's staff and resources were used to administer and manage the affairs of the 1st defendant. All costs and expenses were paid in advance by PMSB and would be reimbursed by the 1st defendant when funds were available.

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[8] A key activity of the 1st defendant was the international event called the Global Emerging Markets Summit (GEMS"). The 1st and 2nd plaintiffs conceptualized and executed the said events in London in 2008 and 2009. GEMS 2010 was being planned from May 2009 and was scheduled to be held in Berlin in October 2010.

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[9] Meanwhile, in July 2008, Tan Sri Rafidah Aziz (DW6) was appointed the patron and adviser of the 1st defendant. At the time of her appointment, the trustees were Roger Hayes, Laxmi P Reilly, Ben Muda and the 1st plaintiff. DW6 then recommended four new trustees to be appointed to the board, namely, Tan Sri Dr Mohd Munir Abdul Majid (DW4), Datuk Dr Rebecca Fatimah Sta Maria (DW3), Dr Noorul Ainur Mohd Nur and Jalilah Baba. The latter two however resigned shortly after appointment. In January 2009, the 2nd defendant was appointed as the executive director of the 1st defendant. The 2nd defendant later recommended the 3rd defendant as trustee.

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[10] On 12 November 2009, the 1st defendant was officially launched by the Prime Minister of Malaysia. DW6 gave the key note address at the launch wherein she sought funds from the Government for the setting up of planned secretariats in London and Brussels. In response to this request, the Prime Minister pledged a sum of RM2 million to the MEF. A first *tranche* of RM1 million was released in January 2010 to the 1st defendant by the Government as per the Prime Minister's pledge.

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[11] This receipt of RM1 million appeared to energize the parties into implementing the Brussels Secretariat as well as taking steps to implement GEMS 2010. In April 2010, an agreement was signed between the 2nd plaintiff, and the 1st and 4th defendants to plan and implement GEMS 2010.

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- A [12] However, not long after that, serious questions were raised by some trustees that expenses for the Brussels Secretariat might be too high even though at that time substantial expenses had already been incurred in leasing the premises for the said secretariat. There was a concern that the 1st defendant would
- B have insufficient funds. Deliberations were then undertaken pertaining to the Brussels Secretariat. After several meetings, an extraordinary general meeting (“EGM”) was called and proceeded with on 18 August 2010. At this meeting, it was resolved to cancel the Brussels Secretariat.
- C [13] At about the same time, the 1st defendant also terminated the service agreement between the 1st defendant and PMSB. There were some suggestions that the 1st plaintiff and PMSB were not forthright and honest in managing the affairs of the 1st
- D defendant. The 1st defendant’s Malaysian Secretariat was then moved into the 4th defendant’s office premises under a new service agreement with a monthly fee of RM5,000 as was the case with PMSB.
- E [14] Meanwhile, six weeks before the scheduled date, GEMS 2010 was also cancelled. Apparently, the question of costs became a crucial factor in not proceeding with GEMS 2010. Added to this was the fact that the Prime Minister of Malaysia who was scheduled to speak at the GEMS Berlin 2010 was unable to attend and neither was the DW6.
- F [15] With this factual background, several contentions were raised by the parties with regards to the claims filed by the plaintiffs. These matters are now the issues for consideration before the court. These issues were considered and decided as follows.
- G **Whether There Was An Agreement Between The 1st Plaintiff And The 1st Defendant To Appoint The 1st Plaintiff As The Head Of The Brussels Secretariat**
- H [16] Within this issue, two matters arise for consideration. The first is whether there was indeed a decision to set up the Brussels Secretariat. The second is whether there was an agreement to appoint the 1st plaintiff as the head.
- I [17] With regards to the first question, there cannot be any dispute that a decision was made to set up the Brussels Secretariat. I think from the very inception of the 1st defendant there was already an intention to set up the Brussels Secretariat.

This was later affirmed by a Circular Resolution dated 1 April 2010 where the BOT authorized the setting up of the Brussels Secretariat. In the BOT meeting of 12 April 2010, a decision was made to renegotiate the lease for Brussels Office premises. It could hardly be disputed that the setting up of the Brussels Secretariat had been one of the reasons advanced to obtain funding from the Government of Malaysia.

[18] On the second question, in the same BOT meeting of 12 April 2010, it was decided that the 1st plaintiff would be appointed to spearhead the operations and setting up of the Brussels Secretariat. It was decided at that meeting that the 1st plaintiff “would have in her letter of employment target KPI’s included, with her offer letter included a possible option for extension”. A letter of appointment was then drafted for the 1st plaintiff to head the Brussels Secretariat for two years commencing 1 July 2010 and ending 30 June 2012.

[19] Now of course, no letter of appointment of the 1st plaintiff was signed as this was overtaken by events which eventually led to the cancellation of the Brussels Secretariat. The defendants contend that since particular essentials to the agreement had yet to be settled and were still being negotiated, there was no contract between the 1st plaintiff and the 1st defendant. Are they right?

[20] I think the BOT meeting of 12 April 2010 had indeed approved of the 1st defendant’s appointment and this was made known to the 1st plaintiff after the decision was taken. Simply put, the 1st defendant had appointed and the 1st plaintiff had accepted. The letter of appointment and the other matters were mere formalities. The only thing left to be settled in the letter of employment was the issue of KPI’s and the option for extension. These were really minor matters and not essential to a contract. Importantly, there was no condition precedent to there being a formal written agreement before there being a concluded contract (see *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498 and *Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd* [2002] 5 CLJ 391).

[21] Much was made of the possibility of no visa approval for the 1st plaintiff to work in Brussels and London. I think this was pure speculation at best. If there was no visa approval, then obviously the contract would become frustrated and come to an end. It did not mean that there was no contract in the first place.

- A [22] So in my view, and for the reasons I have stated, there was a concluded agreement between the 1st plaintiff and the 1st defendant for the 1st plaintiff to head the Brussels Secretariat.

Was There A Breach Of This Agreement?

- B [23] It was in evidence that at the EGM held on 18 August 2010, the members voted against the setting up of the Brussels Secretariat. There was then no further need for the members to decide if the 1st plaintiff was to head the same. With that decision, the agreement between the 1st plaintiff and the 1st defendant had to come to an end. There was therefore a breach of the contract.
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How Should The 1st Plaintiff Be Compensated?

- D [24] In order to claim a remedy in damages, a plaintiff has to provide legally admissible evidence that he or she has suffered some loss or damage. The general principle for compensation in contract is that the aggrieved party, as far as money can do it, be placed in the same position as if the contract had been performed
- E (*Robinson v. Harman* [1848] 1 Exch 850, *Koufos v. Czarnikow Ltd* [1969] 1 AC 350 and *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15).

- [25] In this regard, there are a number of interests that are protected by contract law. The first is the expectation interest where “loss of bargain” damages are allowed to compensate the plaintiff for the defeat of an expectation of a gain or benefit. The second is the reliance interest for which the plaintiff is compensated for expenses or loss incurred to his detriment in reliance on the promised performance but now wasted by the defendant’s breach. The third is the restitution interest where the court obliges a defendant to disgorge a benefit he or she received from the plaintiff. The fourth is indemnity interest which relates to compensation for the actual harm inflicted or expenditure incurred as a result of the breach. This interest would apply in the case where there is a diminution in the value of the plaintiff’s existing assets as a result of the breach of contract. Notwithstanding these interests, the overriding objective ought to be to provide compensation and not to punish or enrich one party to the detriment of the other. In keeping with this principle, a plaintiff may be entitled to only one or more of the interests I have alluded to depending on the justice of the case but certainly never all of the interests as the plaintiffs appear to suggest.
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[26] The law also provides limits to the extent of compensation that can be awarded through the rules of remoteness. This is embodied in s. 74 of the Contracts Act 1950 which in effect is the statutory replication of the principles set out in the celebrated case of *Hadley v. Baxendale* (1854) 9 Exch 341. The rule in s. 74 is that compensation for loss or damage caused by breach of contract can only be awarded if such loss or damage naturally arose from the usual course of things from the breach or which the parties knew at the time when they made the contract to be likely to result from the breach.

[27] Turning now to the instant case, the 1st plaintiff is claiming for the following compensation:

(a) the sum of RM288,000 (EU36,000 per year X 2) which was the agreed payment for her two year appointment to head the Brussels Secretariat.

(b) the sum of RM110,700 being loss of salary from August 2010 to December 2010 at RM22,140 per month due to her resignation from PMSB to take up the Brussels position from 1 July 2010.

(c) the sum of RM327,600 being the 1st plaintiff's time costs in handling matters for the Brussels Secretariat and GEMS 2010.

(d) the sum of RM200,000 being loss of income to have been earned by loss of training opportunities which the 1st plaintiff enjoyed based on a minimum of ten sessions per year at RM20,000 per session.

(e) the sum of RM9,150 being expenses incurred for attending in Brussels to handover the leased premises.

[28] By any measure, these claims made by the plaintiff are rather outlandish claims which go against the principles I have just mentioned. At the outset, I found it rather curious that the 1st plaintiff was willing to take a severe cut in her existing income to take up her appointment in Brussels. But that was her choice. She cannot, however, be claiming both the loss of salary in Brussels as well as the loss of salary and other income in Malaysia. Furthermore, the time costs she is claiming were never agreed and had never ever been claimed prior to this. The irresistible inference is that this claim was an afterthought.

A [29] In my assessment, the 1st plaintiff's only entitlement to damages would be the loss of salary from August 2010 to December 2010 at RM22,140 per month due to her resignation to take up the Brussels appointment. She had resumed her employment after that period as confirmed by PW5 who was the director and Group Financial advisor of PMSB. Any other amount apart from this would amount to a windfall and would be unjust and inequitable. I would therefore assess the damages to the plaintiff at RM110,700. I would also allow a sum of RM9,150 being expenses reasonably incurred in attending to the handing over of the Brussels premises.

D [30] In coming to this finding, I have not overlooked the defendants' contention that the 1st plaintiff was obliged to mitigate her loss. They contend that she has failed to explain why she was not able to resume her employment between the period August 2010 and December 2010 given that she was really the owner of PMSB and other related companies. As such, they maintain that she was only entitled to nominal damages.

E [31] In this regard, the principle concerning mitigation of damage is that the plaintiff, in a case of breach, has a duty or legal responsibility to avoid unnecessary losses. Failure to do so does not attract any liability on the plaintiff's part but it reduces the damages payable by the defendant. This duty was explained in *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd* [1912] AC 673 as "... the duty of taking all reasonable steps to mitigate the loss consequent on breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps" (per Viscount Haldane LC at 689). What is reasonable will depend on the facts of each case. The onus of proof as to reasonableness of the plaintiff's conduct lies on the defendant. According to the authors of *McGregor on Damages*, this is the first and most important rule in that the plaintiff cannot recover for avoidable loss. The second rule is that the plaintiff can recover for loss incurred in reasonable attempts to avoid loss even though the resulting loss is greater than if no mitigating steps were taken in the first place (see *Simonius Vischer & Co v. Holt & Thompson* [1979] 2 NSWLR 322 at 356). The third rule is that the plaintiff cannot recover for avoided losses.

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[32] Having these principles in mind, there was certainly a duty on the part of the plaintiff to mitigate her loss once she became aware that there was not going to be any Brussels Secretariat. At the EGM held on 18 August 2010, it was resolved to cancel the Brussels Secretariat. Certainly the question arises as to why she was unable to resume her employment earlier than she did. However, no such question was posed to the 1st plaintiff at the trial by the defendants. She might well have an explanation for not being able to do so. It would now be unfair to submit that her loss of income was an avoidable loss. The onus was on the defendants to show lack of reasonableness on the plaintiff's part. As the defendants had failed in this regard, I considered their contention to be untenable.

Was There Conspiracy To Injure And To Induce Breach Of Contract?

[33] The plaintiffs are also alleging conspiracy. Specifically, they contend that the defendants had conspired for the predominant purpose of injuring the plaintiffs to induce a breach of the contract. As far as the law on conspiracy is concerned, it is now settled that there are two forms of the tort of conspiracy; conspiracy to use unlawful means and conspiracy to injure.

[34] A conspiracy by unlawful means is proven when two or more individuals combine to commit an unlawful act or combine to effect an unlawful purpose with the intention of causing injury or damage to the plaintiff. In the case of conspiracy to injure or conspiracy where lawful means have been used, the plaintiff must also prove that there was a predominant purpose on the part of the defendants to injure the plaintiff in carrying out their common purpose (see *Lonrho Plc v. Fayed* [1992] 1 AC 448). In each case, damage is an essential ingredient of the tort of conspiracy and there must some evidence of pecuniary loss.

[35] In the instant case, the plaintiffs' contention is that the defendants conspired to remove the 1st plaintiff as head of the Brussels Secretariat, to abort the Brussels Secretariat, to cancel GEMS 2010, to have the Malaysian Secretariat moved out from the office of PMSB to the office of the 3rd and 4th defendants and to remove the 1st plaintiff as chairperson and cheque signatory of the 1st defendant.

- A** [36] Having perused the entire evidence at the trial very carefully, I think, with respect, it would require a leap of imagination to come to the conclusion that there was such a conspiracy. To me, both the documentary as well as the oral evidence suggests quite the contrary.
- B** [37] In my view, the defendants have provided valid reasons in overturning the decision to set up the Brussels Secretariat. The main issue was the question of funding. I think the BOT were quite right in being concerned about money and of course the issue of being accountable for the RM1 million received from the Government of Malaysia. This was after all taxpayers' money. They were instead thinking of setting up an office in Berlin where the costs would be minimal in comparison with the costs of setting up and maintaining the Brussels Secretariat. Going by the budget presented to the Board, the RM1 Million received or even the RM2 million pledged was not going to last for long. So I do not for a moment think there was any sinister motive as insinuated by the 1st plaintiff.
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- E** [38] The decision not to continue with GEMS 2010 was based on financial and other reasons. The non-attendance of the Prime Minister of Malaysia as well as the patron would reduce the impact and significance of the summit. As for terminating the agreement with PMSB, the 1st plaintiff had already indicated that she wanted the 1st defendant to move out from PMSB's office after December 2010. I do not see anything sinister if the 1st defendant decided to move out earlier especially as the 4th defendant was willing to provide the same services at the same cost.
- F**
- G** [39] The 1st plaintiff has alluded to various conversations, electronic mails or text messages among the trustees and officers of the 1st defendant to her exclusion. Be that as it may, and I am not convinced that her intimations about being excluded are accurate, I have noted that all decisions were made transparently at meetings. The misgivings of some of the trustees about the Brussels Secretariat were directly communicated to her. I can understand and appreciate her unhappiness with the trustees revisiting the issue but I fail to see any evidence of the motives of the trustees or others in question being spiteful or malicious. From the evidence adduced, I am convinced that the actions taken were for the benefit of the 1st defendant and not with the predominant purpose of injuring the plaintiffs.
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[40] In this regard, in the decision of *Crofter Hand Woven Harris Tweed Company Limited & others v. Veitch & Anor* [1942] AC 435, the House of Lords had this to say: A

The test is not what is the natural result of the plaintiffs of such combined action, or what is the resulting damage which the defendants realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did ... It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person. (per Viscount Simon LC at 445) B C

[41] For the reasons I have stated, I find the claim that the predominant purpose of the defendants was to injure the plaintiffs as being fanciful and farfetched. Needless to say, the claim of conspiracy is clearly unsustainable. D

Is The 2nd Plaintiff Entitled To Claim Against The 1st And 4th Defendants? E

[42] In this regard, a Memorandum of Understanding dated 13 April 2010 (“MOU”) was entered into between the 1st defendant, the 4th defendant and the 2nd plaintiff to jointly prepare, manage and hold the GEMS Summit 2010 in Berlin on 6 October 2010. It was expressly provided in the agreement that all three parties were to equally share any profit and loss with regards to the same. This summit was eventually aborted and the 2nd plaintiff is claiming that there was a breach of the agreement. The 2nd plaintiff is claiming loss and damage for preparatory works to the tune of RM656,850. F G

[43] Now I think it can hardly be disputed that all three parties to the MOU were concerned by the costs since GEMS 2008 and GEMS 2009 did not make any profit. This was set out in cl. B4 where the parties pledged to ensure costs are kept to a minimum in order to maximize potential profits. H

[44] I think the crucial question is why was GEMS 2010 aborted? The plaintiffs appear to suggest that there was some kind of conspiracy or sinister motive not to proceed with GEMS 2010. However, I think the evidence clearly suggests otherwise for the following reasons. Firstly, all the parties recognized that there was I

- A a real risk of incurring unnecessary losses because there was at that time insufficient funding. Secondly, the Prime Minister of Malaysia who was meant to speak at GEMS 2010 was unable to attend. Neither was Tan Sri Rafidah Aziz (DW6) who was the patron of 1st defendant. There was therefore a genuine concern
- B that GEMS 2010 could not be successful.

- [45] It was suggested that the 1st defendant was able to fund GEMS 2010 on behalf of the other partners. But there was no obligation on the 1st defendant to do so. In any event, why
- C would they do that after learning that the Prime Minister of Malaysia as well as DW6 were not able to attend?

- [46] In the circumstances, I do not see how there was a breach. In my view, the whole agreement became frustrated because of the fear of making losses. And I think that is why in the end, it
- D was accepted by all the parties that GEMS 2010 had to be aborted. This claim by the 2nd plaintiff therefore appears to be an afterthought.

- [47] Even if there had been a breach by the 1st defendant, the
- E only claim that the 2nd plaintiff would be entitled to would be the loss of profits that GEMS 2010 would have made and not the claims of time costs for preparatory works. That was certainly not the basis upon which the MOU was concluded. For these reasons, the 2nd plaintiffs claim must fail.

- F **Are The Plaintiffs Entitled To Claim For Loss Of Reputation, Mental Stress, Torment And Harassment?**

- [48] The plaintiffs have pleaded and claimed for loss and damages
- G for the 1st plaintiff's professional reputational loss as well as for mental stress, torment and harassment caused by the defendants and loss of business reputation of both plaintiffs.

- [49] In this regard, and as a matter of law, damages for loss of reputation or injured feelings cannot be recovered in an action
- H based upon conspiracy. In *Lonrho Plc & Others v. Fayed & Others* (No. 5) [1994] 1 All ER 188, the Court of Appeal in England held:

- ... Damages for injury to reputation or business reputation or injury to feelings could only be recovered in an action for
- I defamation, in which justification could be pleaded by way of an absolute defence, and not in an action for conspiracy and the difficulty of meeting a defence of justification could not be side-stepped by bringing an action for conspiracy to injure by lawful

means. Furthermore, injury to reputation and to feelings was, with limited exceptions, a field of its own, and the established principles in that field also could not be side-stepped by alleging a different cause of action ...

A

[50] It is also trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract except in three well-known cases, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds to meet it, actions for breach of promise to marry, and actions where the vendor of real estate, without any fault on his part, fails to make title (*Addis Gramophone Co Ltd* [1909] AC 488 and followed in *Kapt (B) Hj Mohamad Ismail v. Perwira Affin Bank Bhd (No 2)* [2001] 5 CLJ 184). It was suggested in *CCA Holdings Ltd v. Palm Resort Bhd* [1998] 4 CLJ 440 that there may be other exceptions.

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[51] Whatever may be the position, any such claim will have to pass the remoteness rule in s. 74 of the Contracts Act 1950 which I had referred to earlier. I do not think it can be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage is far too remote. I would therefore surmise that damages for loss of reputation generally cannot be claimed except in actions for defamation. If the plaintiffs were really serious about claiming damages for loss of reputation and for injured feelings, they ought to have filed a claim for defamation instead of proceeding in the fashion that they did. No damages are therefore allowable in this regard.

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Is The 1st Defendant Entitled To The Counterclaim Against 1st Plaintiff For Breach Of Fiduciary Duties?

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[52] The 1st defendant contends that the 1st plaintiff had breached her obligations as trustee and breached her fiduciary duties to the 1st defendant when she caused the payment of RM50,000 to be made by the 1st defendant to PMSB, a company in which the 1st plaintiff had an interest.

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[53] Now although the payment of RM50,000 may have been premature, I do not think there was any breach of fiduciary duty simply because there was in existence a service contract for one year between PMSB and the 1st defendant at RM5,000 per month. It was not really a case where the 1st defendant had no obligation to pay. Payment was required under the contract. It

I

A may have been inadvisable to pay the whole sum up front but I think this alone is insufficient to establish that the 1st plaintiff was motivated by self-interest. For this reason, the counter claim cannot succeed.

B Conclusion

[54] In the premises, the 1st plaintiff's claim against the 1st defendant is allowed for the sum of RM110,700 and the sum of RM9,150. The total sum allowed comes to RM119,850. The 2nd plaintiff's claim against the 1st and 4th defendants is dismissed.

C The counter claim of the 1st defendant against the 1st plaintiff is also dismissed. All other claims by the plaintiffs are disallowed.

[55] As for costs and after hearing the parties, I order the 1st defendant to pay the 1st plaintiff one set of costs assessed at

D RM30,000. I have taken note that the 1st plaintiff was successful in only a part of her claim. I also order the 2nd plaintiff to pay the 1st and 4th defendants costs assessed at RM15,000.

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